

ESTTA Tracking number: **ESTTA653651**

Filing date: **02/02/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91207333
Party	Plaintiff RxD Media, LLC
Correspondence Address	CECIL E KEY DIMUROGINSBERG PC 1101 KING STREET , STE 610 ALEXANDRIA, VA 22314 UNITED STATES ckey@dimuro.com, ssakagami@dimuro.com
Submission	Motion to Extend
Filer's Name	Sara M. Sakagami
Filer's e-mail	ssakagami@dimuro.com
Signature	/Sara M. Sakagami/
Date	02/02/2015
Attachments	Opposer's Req for Ext of Discovery and Trial.pdf(596737 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

RXD MEDIA, LLC

Opposer

v.

IP APPLICATION DEVELOPMENT LLC,

Applicant.

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**Opposition No. 91207333
91207598**

REQUEST FOR EXTENSION OF DISCOVERY AND TRIAL SCHEDULE

Pursuant to TBMP § 509 and Fed. R. Civ. P. 6(b), Opposer RxD Media, LLC (“Opposer”) hereby requests an extension of the discovery and trial schedule as detailed below for the reasons set forth herein. The undersigned counsel has conferred with counsel for Applicant, IP Application Development LLC (“Applicant”) regarding the requested extension, and Applicant has indicated that while it will consider an extension for specified discovery events, it opposes the general extension hereby requested by Opposer. Opposer requested that Applicant provide a specific proposal, but as of the date of this filing, no such proposal has been received.

Background

On April 3, 2014, the Board suspended the proceedings in this consolidated opposition in light of the withdrawal of Opposer’s counsel. Opposer then proceeded with efforts to identify new counsel, and on September 29, 2014,¹ the undersigned counsel filed their entry of appearance on behalf of Opposer with the Board. On December 15, 2014, the Board resumed the proceedings in this opposition. The order resuming the proceedings set February 9, 2015 as

¹ Opposer requested a series of extensions at it attempted to identify and engage new counsel, and Applicant either expressly consented or did not file an opposition to each of these requests. See proceeding records located at <http://ttabvue.uspto.gov/ttabvue/v?pno=91207333&pty=OPP&eno=28>.

the deadline for the close of discovery, and also established deadlines for the remainder of the proceedings.

On December 18, 2014, the undersigned counsel wrote a letter to Applicant's counsel identifying witnesses Opposer wished to depose and requesting available dates for the deponents. *See Ex. A, C. Key Dec. 29, 2014 letter to G. Gundersen.* Based on the dates of availability for the noticed witnesses subsequently received from Applicant, Opposer issued notices of depositions on January 20, 2015. The depositions were to be taken on February 3-4, 2015 in Northern California, where Applicant's offices are located.

On December 29, 2014, two weeks after receiving the order resuming the proceedings, Opposer served additional written discovery to Applicant. The responses to these discovery requests were due on January 28, 2015.

On January 29, 2015, three business days before the noticed depositions were scheduled to go forward, Applicant's counsel informed Opposer that the witnesses were no longer available on February 3-4 as originally planned. *See Ex. B, D. Hope Jan. 29, 2015 email to C. Key.* Opposer indicated to Applicant that prior to rescheduling the depositions, Opposer wished to discuss, and hopefully resolve, issues with Applicant's responses to written discovery, which had not been received until after 11:00 p.m. on January 28. Applicant's responses did not include any documents responsive to the discovery requests, nor did they provide any indication of when documents would be produced or what volume of documents Opposer should expect. *See Ex. C, C. Key Jan. 29, 2015 email to D. Hope.* Opposer also indicated that it wished to receive documents requested in its December 29 requests to assure a full and meaningful examination of the noticed witnesses. *See id.* As of the date of this filing, only one business day before the

noticed depositions were originally scheduled to go forward, the requested documents had not been produced.

At the same time, Applicant issued two notices of deposition for Opposer's deponents, one seeking testimony of Opposer's corporate designee(s) that was served on January 22, 2015, and one seeking the deposition of an individual deponent that was not served until January 30, 2015. Applicant has also requested information concerning potential depositions of at least three additional deponents, *see* Ex. D, C. Key Jan. 26, 2015 email to D. Hope, and has indicated that Applicant may wish to serve additional written discovery on Opposer. Opposer has been working to identify dates for the two noticed deponents, and has indicated its willingness to cooperate as to the additional deponents Applicant has identified. *See id.*

Extension Request

In light of the foregoing, Opposer respectfully requests that the discovery and trial proceedings be reset as follows:

Event	Current Deadline	Requested Extension
Discovery Closes	February 9, 2015	March 31, 2015
Plaintiff's Pretrial Disclosures	March 26, 2015	May 15, 2015
Plaintiff's 30-day Trial Period Ends	May 10, 2015	June 29, 2015
Defendant's Pretrial Disclosures	May 25, 2015	July 14, 2015
Defendant's 30-day Trial Period Ends	July 9, 2015	August 28, 2015
Plaintiff's Rebuttal Disclosures	July 24, 2015	September 14, 2015
Plaintiff's 15-day Rebuttal	August 23, 2015	October 12, 2015

Period Ends		
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As can be seen from the current status of the proceedings outlined above, both parties have additional discovery that they wish to pursue. The parties also need an opportunity to confer as to the deficiencies in Applicant's discovery responses, particularly in light of the fact that the Applicant has not produced any documents responsive to the Opposer's December 29 discovery requests, and potentially to conduct follow up discovery. Opposer promptly issued its discovery requests upon receiving the Board's order resuming the proceedings, and notified Applicant of depositions Opposer wished to pursue. Applicant's deponents apparently have limited availability, and Applicant has asked that depositions go forward in California. While Opposer agreed to the California depositions to accommodate Applicant's witnesses, the cross-country travel necessitates more significant advanced planning than would be the case if the depositions occurred on the East Coast (e.g., Washington, D.C. area or Philadelphia where the parties' respective counsel are located). The resolution of other issues, such as the production of responsive documents and written discovery responses, are of heightened significance under these circumstances due to the potential difficulty and disruption of continuing the depositions should that become necessary.

The parties have attempted to maintain the current schedule, but the recent developments regarding the deposition schedules and other discovery issues have made clear that it is impractical to believe that discovery can be completed, or even substantially completed, by the current deadline. Opposer is therefore presenting this motion within two business days of learning of the deposition scheduling and other discovery issues.

Applicant has suggested that the discovery period only be extended for some unspecified time and for certain as-yet unspecified events. However, given the number and range of

discovery issues that the parties are still trying to resolve, it is unclear how such an extension could be effectively crafted. Moreover, the process thus far suggests that Opposer could be prejudiced in meeting its subsequent deadlines, unless a further extension is granted.

Accordingly, Opposer respectfully submits that good cause is shown for the extension because it will allow the parties, including Opposer's new counsel, to more effectively address the discovery process, which was only reinstated in the middle of the December-January holiday season, and provides the best opportunity to avoid discovery disputes and lengthier delays. In addition, the extension requested is for less than two months, and there is no indication of prejudice to either party by such a brief extension.² By contrast, Opposer could be significantly prejudiced by a discovery and trial schedule that forecloses its ability to conduct thorough and meaningful discovery regarding the issues presented in these consolidated opposition proceedings.

Opposer therefore respectfully requests that the discovery and trial schedule be extended as outlined above.

Conclusion

Based on the foregoing, Opposer requests that the deadline for close of discovery, currently set for February 9, 2015, be extended up to and including March 31, 2015, and that subsequent trial dates be likewise extended for a like number of days. Good cause is shown in that the extension will allow both parties the opportunity to fairly pursue the discovery each has identified, including the taking of depositions of deponents already identified, in a manner calculated to avoid discovery disputes and lengthier delays. While the extension could help

² To date, Applicant has expressly agreed to or acquiesced to all requested extensions. *See* <http://ttabvue.uspto.gov/ttabvue/v?pno=91207333&pty=OPP&eno=28>; *see also* Note 1, *supra*. There is no indication that Applicant will be prejudiced under these circumstances by the brief additional extension that Opposer is requesting.

preserve the resources of the parties and the Board, no prejudice will result from the brief extension that is being requested. Moreover, this request is being made promptly by Opposer after the circumstances on which the request is based arose, and not for the purposes of delay.

Opposer therefore respectfully requests that its motion be granted.

Dated: February 2, 2015

Respectfully submitted,

RXD MEDIA, LLC
BY COUNSEL

/s/ Cecil E. Key
Cecil E. Key, Esq. (VSB #41018)
Sara M. Sakagami (VSB #77278)

Counsel for RxD Media, LLC.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of February, 2015 a true copy of the foregoing was electronically mailed to the following:

Glenn A. Gundersen
Daniel P. Hope
Dechert LLP
Cira center, 2929 Arch Street
Philadelphia, PA 19104-2808
glenn.gundersen@dechert.com
daniel.hope@dechert.com
Attorneys for IP Application Development LLC

_____/s/ Cecil E. Key_____
Cecil E. Key, Esq. (VSB #41018)



DIMUROGINSBERG PC
ATTORNEYS AT LAW

December 18, 2014

BERNARD J. DIMURO
NINA J. GINSBERG
MICHAEL S. LIEBERMAN
JONATHAN R. MOOK
C. THOMAS HICKS III
STEPHEN L. NEAL, JR.
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STACEY ROSE HARRIS
KENDALL A. ALMERICO*
M. JARRAD WRIGHT
SARA M. SAKAGAMI
TAYLOR S. CHAPMAN
RACHAEL E. LUZIETTI

VIA Email

Glenn A. Gundersen, Esq.
DECHERT LLP
Cira Center
2929 Arch Street
Philadelphia, PA 19104-2808

Re: *RxD Media, LLC v. IP Application Development LLC*
Opposition Nos. 91207333 (Parent) and 91207598 (TTAB)

Dear Glenn:

As I believe you are aware, the TTAB has now resumed the proceedings in the above-captioned oppositions. As a result, we will be serving RxD Media, LLC's additional discovery requests to you shortly. We will also be providing to you a list of deficiencies we have identified in IP Application Development's discovery responses to date. Of particular note is the lack of any documents or communications to or from Steve Jobs, who IP Application has identified as the person "primarily responsible for the selection of Applicant's Marks" (*see* Response to RxD Interrogatory No. 6), regarding adoption of the IPAD mark.

We also intend to take the depositions of at least the following individuals: Thomas La Perle, Douglas Vetter and Dan Cooperman. Pursuant to the current schedule, these depositions must be completed by February 9, 2015. Accordingly, please let me know the dates that these individuals can be available for deposition in January. If it is IP Application's position that one or more of these individuals is not within IP Application's control, please provide the individual's last known address so that we may issue the proper subpoena.

Finally, in light of the intervening holidays, we are willing to discuss a short extension of the current schedule if that is of interest to IP Application. Please let me know and we will put together a proposal.

We otherwise look forward to receiving the available dates for the deponents we have identified.

† MEMBER OF KEY IP LAW GROUP, PLLC
* LICENSED ONLY IN FL

Gundersen

Page 2 of 2

December 18, 2014



DIMUROGINSBERG^{PC}
ATTORNEYS AT LAW

Sincerely,

A handwritten signature in cursive script, appearing to read 'Cecil E. Key'.

Cecil E. Key

Sara Sakagami

From: Hope, Daniel <Daniel.Hope@dechert.com>
Sent: Thursday, January 29, 2015 12:04 PM
To: Cecil Key
Subject: RxD Media, LLC v. IP Application Development LLC - deposition scheduling

Cecil -

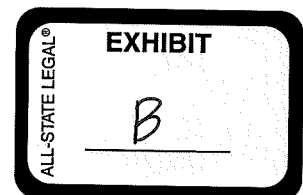
Following up our call, I can now confirm that Tom La Perle is not available to be deposed on February 3rd, on account of unforeseeable circumstances. I understand that you will be getting in touch with me to discuss rescheduling the deposition after you have reviewed Applicant's discovery responses.

Thanks,
Dan

Daniel P. Hope

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Sara Sakagami

From: Cecil Key
Sent: Thursday, January 29, 2015 5:05 PM
To: Daniel.hope@dechert.com
Cc: glenn.gundersen@dechert.com; Sara Sakagami
Subject: RxD v. IP Application: Deposition and Discovery Issues

Dan:

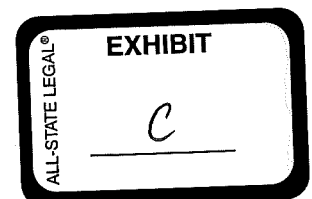
As discussed, I am following up regarding the rescheduling of the depositions of Mr. LaPerle and Mr. Vetter, which we noticed for February 3-4, in light of the fact that Mr. LaPerle is now not available on February 3 as we had originally understood. At the same time, we have begun reviewing IP Application/Apple's written discovery responses and while that review is not complete, it is clear that there a number of deficiencies that will need to be addressed, and those issues seem likely to have a direct and negative impact on RxD's ability to conduct the noticed depositions. We also have not received any documents in response to our document requests, nor have we been given any indication of when we might expect to receive documents or how many documents we might expect, despite our request for that information. As with the written responses, the lack of documents has the strong potential to impede efficient and meaningful examination of the witnesses. These issues are exacerbated by the current schedule and what appears to be limited availability of IP Application's witnesses.

Accordingly, to best assure that RxD is given the opportunity to meaningfully exam the witnesses, and that the noticed depositions can proceed efficiently and in a cost-effective manner, please provide us with dates when Mr. LaPerle and Mr. Vetter can be available for deposition at least two weeks after IP Application has produced responsive documents. In addition, IP Application has never produced a privilege log, including for documents previously produced. Please promptly provide us with the privilege log, and update it with the upcoming production. In the meantime, we will expedite the process of meeting and conferring regarding the deficiencies in IP Application's responses, about which we will write to you separately, so that some if not all of those issues can be resolved before the depositions.

We will need to request an extension of the discovery schedule in light of the discovery issues outlined above. If IP Application is willing to agree to an extension under these circumstances, please let me know and we will then discuss the amount of time to be requested in a stipulated motion. Likewise, please let me know if IP Application will oppose an extension, and we will file a motion unilaterally.

Thank you, and we look forward to receiving your response.

Cecil E. Key
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(703) 388-0648 (Facsimile)
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Email: ckey@dimuro.com



Sara Sakagami

From: Cecil Key
Sent: Monday, January 26, 2015 9:15 AM
To: Daniel.hope@dechert.com
Cc: glenn.gundersen@dechert.com; Sara Sakagami
Subject: RxD v. IP Application Deposition Information

Daniel:

As discussed during our meeting on Friday (Jan. 23), I have conferred with RxD concerning the depositions you indicated IP Application is considering noticing, and the information we have is as follows.

Keith Clements. We will represent Keith Clements regarding his deposition. We are working on dates of availability for the deposition, and will let you know once we have further information about Mr. Clements' availability.

Ben Clements. Ben Clements assisted RxD in the settlement discussions RxD had with Glenn in Dechert's offices last summer, but prior to that, he had no involvement in RxD's business affairs, including any that are relevant to this proceeding. If IP Application nevertheless wishes to take his deposition, we will represent Mr. Clements and make him available based upon a notice (without the need for a subpoena) at a mutually agreeable date and time. We will, of course, object to the admissibility of any testimony or information regarding the settlement discussions.

David Wiles. We do not represent Mr. Wiles. He acted as a contractor for RxD, and was never an employee. He is therefore not within RxD's control. He has done no work for RxD for several years, and RxD has no record of his current whereabouts. A subpoena will have to be issued for Mr. Wiles to the extent he can be located.

Frank Merenda. Mr. Merenda was engaged as a consultant to assist in providing an assessment of potential settlement value to be discussed with IP Application Development/Apple, and attended the meeting with Glenn last summer as part of that engagement. Mr. Merenda also provided some consultation services to RxD's counsel. Mr. Merenda has not been engaged by RxD for any other purpose, does not have independent knowledge outside the confines of his consultancy, and we do not anticipate presenting Mr. Merenda as a witness in these proceedings. We will therefore object to the admissibility of any testimony or information concerning the settlement discussions, and will further object to any attempted inquiries regarding Mr. Merenda's consultations with counsel. Mr. Merenda has no relationship with RxD beyond his consultancy, and if IP Application still wishes to take Mr. Merenda's deposition in light of this information, we will need to discuss potential representation with him. In any event, a subpoena will need to be issued.

Please let us know how you wish to proceed once you have reviewed this information, and we will come back to you with potential dates for Keith Clements' deposition.

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